



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

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) ISCR Case No. 15-08068
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Applicant for Security Clearance

Appearances

For Government: Andrew Henderson, Esq., Department Counsel

For Applicant: Leon J. Schachter, Esq.

June 2, 2017

Decision

MOGUL, Martin H., Administrative Judge:

Statement of the Case

On June 17, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline H for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended; and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

On July 13, 2016, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge (AJ). The case was assigned to this AJ on August 31, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on September 14, 2016, and the hearing was convened as scheduled on November 8, 2016.

At the hearing, the Government offered Exhibits 1 through 2, which were received without objection. Applicant testified on his own behalf and submitted Exhibits

A through H, which were also admitted without objection. Three additional witnesses testified on behalf of Applicant. The record was kept open until November 18, 2016, to allow Applicant to submit additional evidence. No additional documents were received. DOHA received the transcript of the hearing (Tr) on December 9, 2016. Based upon a review of the pleadings, exhibits, and the testimony of Applicant and the additional witnesses, eligibility for access to classified information is denied.

Findings of Fact

After a complete and thorough review of the evidence in the record as described above, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 42 years old. He has been married since September 2014, and he has no children. Applicant received a Master's degree in Engineering in 2002, and a Bachelor's degree in Mechanical Engineering in 1998. Applicant has been employed by a Government contractor since 2002. He began as an entry level engineer, and he currently works as a Systems Director, in which he supervises nine people. Applicant seeks a DoD security clearance in connection with his employment in the defense sector.

Guideline H - Drug Involvement

The SOR lists two allegations (1.a. and 1.b.) under Adjudicative Guideline H, which will be reviewed below:

1.a. The SOR alleges, and Applicant admitted in his RSOR, that he, "used marijuana with varying frequency from approximately January 2007 to August 2014."

At the hearing, Applicant testified that he first used marijuana in approximately 2007, when he was 33 and he started "hanging out" with his cousin and his friends, who were using marijuana. He described his marijuana usage as infrequent and in social settings. He also stated that he has never purchased the marijuana that he used, but rather it was always given to him or passed around at a social setting. His frequency of use stayed the same from 2007 through 2010. After some additional questioning by Department Counsel, Applicant estimated that his marijuana use was approximately 5 times a year for the years 2007 through 2010. In 2011 or 2012, he began spending less time with the people with whom he used marijuana; and in 2012 or 2013, he met his future wife, who did not enjoy spending time with the people who were using marijuana. Both of these events resulted in him using marijuana less frequently. He estimated that since he met his future wife he has only used marijuana two or three times. It was estimated that Applicant used marijuana approximately 35 times in total, all during the period when he held a security clearance. (Tr at 30-33, 48-49.)

Applicant testified that the last time he ever used marijuana was at his bachelor party, which was "a couple of weeks before [his] wedding." The wedding was held on September 13, 2014. Since that time he has been at events where he has been offered

marijuana, but he has always declined, and he indicated that he has no difficulty in refusing marijuana. Applicant cited several reasons why he is motivated to never use marijuana in the future. They include the following: marijuana makes him less motivated, which is counter to his character; he is dedicated to being a good husband to his wife; he is now in a management position, and he has nine supervisees who count on him to set a good example; and finally, his mother-in-law is moving in with them, and she is another person who will rely on him. (Tr at 33-39.)

1.b. The SOR alleges, and Applicant admitted in his RSOR, that “he used illegal drugs after being granted a security clearance in March 2005.”

Applicant confirmed that he started working at his present employer in 2002, and he first received his security clearance in March 2005. (Tr at 42-43.) As has been reviewed above, Applicant used marijuana approximately 35 times while holding a security clearance, which continued from 2007 to August 2014.

Applicant conceded that he made a poor decision by using illegal drugs while holding a security clearance. He also admitted that he knew that not only does the DoD mandate that an individual with a security clearance not use illegal drugs, including marijuana, but his employer also has a policy that its employees must not use illegal drugs. He averred that he knows it was a mistake to use drugs while holding a security clearance and he would never use any illegal drugs in the future. (Tr at 25-26, 50.)

Mitigation

Applicant submitted a statement signed by him under penalty of perjury on September 28, 2016, in which he wrote that he is not addicted to marijuana; he never intends to use marijuana or any other illegal drugs again, whether or not he holds a security clearance; and he agrees to random drug testing for as long as he holds a security clearance. Further if he had any violation with regard to illegal drug use, he would consent to automatic revocation of his security clearance. (Exhibit H.)

As reviewed above, three witnesses testified on behalf of Applicant. They included his direct supervisor, and his supervisor’s supervisor. Both of them testified that Applicant was a very, good employee. (Tr at 65-95.) Upon a direct question from me, his direct supervisor testified that Applicant told him that he used marijuana on just a few occasions and for a really short amount of time, after which he quit. (Tr at 81.) The third witness was Applicant’s wife. She testified that she was not aware before they were married that Applicant had used marijuana, but he subsequently told her he had used marijuana during his bachelor’s party. She stated that he never told her about any other usage by him of marijuana. She indicated that she highly objects to drug usage, and she did not believe her husband would use any illegal drugs in the future. (Tr at 96-103.)

Applicant also submitted a number of exhibits in mitigation including: extremely positive Performance Evaluations (Exhibits A through C) and his current curriculum vitae. (Exhibit D.)

Four character letters were also submitted. (Exhibit E.) One of the letters was written by Applicant's spouse. In the letter she wrote that she had reviewed the Statement of Reasons in this case and was aware of the specific nature of the government's security concerns. What is of concern is that when his wife testified, she indicated that she was only aware of one use of marijuana by her husband at his bachelor's party. If she had, in fact, read the SOR, then she would certainly be aware that Applicant was alleged to have used marijuana from 2007 to August 2014. Either she did not read the SOR, as she wrote in her letter, or she was not being truthful about what the Applicant told her. Therefore, I do not give any credibility to her letter or any of her testimony. Another letter was from Applicant's supervisor, who, as reviewed above, testified that Applicant only indicated he used marijuana on just a few occasions for a very short period of time. However, in his letter, he wrote that he also had reviewed the Statement of Reasons in this case and was aware of the specific nature of the government's security concerns. Therefore, he also should have been aware of the allegations of Applicant's marijuana usage, and I therefore, do not give any credibility to his letter or testimony. I also considered that, based on both of these witnesses testimony, Applicant did not give them a full history of his marijuana usage.

Finally, Applicant submitted a letter from a Licensed Substance Abuse Professional and Licensed Social Worker, who opined that Applicant is "not at risk of relapse, or return to his previous behavior." (Exhibit G.) However, nowhere in the letter does it indicate what Applicant told her about his history of marijuana abuse. Based on the discrepancies with his reporting his substance abuse to his supervisor and his wife, I do not feel confident that this person based her opinion on all of the facts. Therefore, I have not used this letter in helping me to reach my decision.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this

decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H - Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgement and because it raises questions about a person's ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, specifically the use of marijuana approximately 35 times for seven years, and as recently as August 2014, while he was holding a security clearance, is of great concern, especially in light of his continued desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement ¶ 25(a) “any drug abuse” and (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.” ¶ 25(g) is also applicable because of Applicant's “illegal drug use after being granted a security clearance.”

Applicant did testify and offer his written statement that he intends to abstain from using marijuana or any illegal drug in the future. However, Applicant used marijuana

as recently as August 2014, and for approximately 35 times while he was holding a security clearance, and there is real concern about Applicant's honesty regarding his providing information to his witnesses about his marijuana history. Accordingly, I find that at this time I cannot make the determination that Applicant will not use drugs in the future. Therefore, I cannot conclude that any of the mitigating conditions are applicable at this time.

In this case, the Government has met its initial burden of proving that Applicant has used illegal drugs under Guideline H, especially while holding a security clearance. Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation, or mitigation, which is sufficient to overcome the Government's case against him. If Applicant is able to establish in the future a longer pattern of abstention from the use of any illegal drug, the outcome could be different, but at this time Guideline H of the SOR is concluded against Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline H in my whole-person analysis. There are significant unresolved concerns about Applicant's years of marijuana usage, especially while holding a security clearance.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Drug Involvement security concerns under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: AGAINST APPLICANT

Subparagraph 1.a.-1.b.: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Martin H. Mogul
Administrative Judge